The ongoing pandemic caused by the novel coronavirus has upended the American health care system in many ways. One of the many effects of COVID-19 will likely be substantial disruption in value-based payment arrangements between health plans and providers. Though this is an issue that is not on the top of providers or payors minds as the health care system prepares to respond to the crisis, there are some simple steps that providers can take now to avoid issues in the future.

Any iteration of value-based payments ("VBP") is likely to be disrupted by COVID-19; be it shared savings, shared risk, or full risk arrangements. Quality targets and reporting deadlines are likely to be missed as providers move many routine and preventative services to telehealth services or suspend them entirely for the time being, as well as turn the bulk of their clinical focus to COVID-19. Cost savings targets are likely to be missed or at least distorted as providers focus on building out their capabilities to address the pandemic. How will these sudden and substantial changes affect the parties participating in value-based arrangements?
CMS has already announced that it will amend its quality reporting requirements from the fourth quarter of 2019 through the end of the second quarter of 2020.[1] The announcement covers a variety of quality reporting requirements and payment programs with the stated purpose of alleviating reporting requirements and disregarding unrepresentative data created during the emergency. States may choose to follow suit for Medicaid programs. How these government steps would flow down into VBP agreements between managed care plans and providers is not clear and requires analysis of the specific agreements.

Few existing VBP arrangements address how an emergency situation like this pandemic affects quality or cost provisions built into payment methodologies. Some contracts include force majeure clauses – it is a case by case analysis of such clauses to determine whether it excuses performance and, if it did, what the impact of that excused performance would be on payment obligations. Another possible relevant provision in some cost savings formulas in VBP arrangements might be the exclusion of high cost outlier cases.

For parties entering into new VBP contracts, a force majeure argument is unlikely to be useful, because the current crisis is not an unforeseeable event; rather, the parties are entering into the agreement with knowledge of it. It is likely too substantial a task at this urgent time to fundamentally change value-based arrangements that providers have been negotiating up to this point. The parties should, however, at the very least acknowledge that at least the first and second quarters of 2020 will represent highly abnormal performance by providers, and agree that the parties will negotiate in good faith to address that issue when the current emergency subsides. By doing so, the parties can at least enter into value-based arrangements in the normal course of business with some assurance that the parties will act in good faith in recognizing a period that will likely represent a substantial deviation from normal performance.

While assessing the impact of the pandemic on VBP arrangements may not be a priority in the midst of the COVID-19 pandemic, acknowledging the effect it will have in those VBP arrangements and memorializing the need to address this issue after the fact will go a long way in addressing future issues.


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